

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

FILED

JAN 24 2019

Clerk, U.S. Courts  
District Of Montana  
Missoula Division

TOM MCGOVERN,

Plaintiff,

vs.

TOM WOODS, CHERIE BILODEAU,  
and CONNIE WINNER,

Defendants.

CV 16-00089-M-DLC-JTJ

ORDER

United States Magistrate Judge John Johnston entered his Findings and Recommendations on November 27, 2018, recommending Plaintiff Tom McGovern’s (“McGovern”) action against all Defendants should be dismissed pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for failure to prosecute. (Doc. 34 at 4.)

McGovern did not object to the Findings and Recommendations; therefore, he has waived his right to de novo review thereof. 28 U.S.C. § 636(b)(1)(C). Absent objection, this Court reviews findings and recommendations for clear error. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc); *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Clear error exists if the Court is left

with a “definite and firm conviction that a mistake has been committed.” *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000) (citations omitted).

While acknowledging this Court has the power to dismiss a case *sua sponte*, Judge Johnston noted dismissal is a harsh penalty and should only be imposed in extreme circumstances. (Doc. 34 at 2 citing *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986); Fed.R.Civ.P. 41(b); *Fredik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992).) Judge Johnston evaluated five factors prior to determining that dismissing McGovern’s action was the appropriate recommendation: (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on the merits. (Doc. 34 at 2 citing *Pagtalunan v. Galaza*, 291 F.3d 639 (9th Cir. 2002) (citation omitted).) Judge Johnston found that factors 1 through 4 favored dismissal of the action, and factor 5 weighed against dismissal. Upon balancing these factors and in light of McGovern’s failure to comply with the Court’s orders, Judge Johnston found dismissal of the action was proper. This Court reviews Judge Johnston’s Findings and Recommendations for clear error. Finding no clear error,

IT IS ORDERED that Judge Johnston's Findings and Recommendations (Doc. 34) are ADOPTED IN FULL. This matter is DISMISSED and all pending motions are terminated.

IT IS FURTHER ORDERED that the Clerk of Court is directed to close the matter and enter judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure, and all pending motions are terminated.

IT IS FURTHER ORDERED that the Clerk of Court is directed to have the docket reflect that the Court certifies that any appeal of this decision will not be taken in good faith pursuant to Rule 24(a)(3)(A) of the Federal Rules of Appellate Procedure.

DATED this 24<sup>th</sup> day of January, 2019.



Dana L. Christensen  
Dana L. Christensen, Chief Judge  
United States District Court